IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0518

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS HAMILTON MCCLELLAND,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jeffrey H. Langton, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
JENNIFER A. HURLEY
Assistant Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
SHERI K. SPRIGG
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

GEORGE H. CORN
Ravalli County Attorney
Courthouse
205 Bedford Street
Hamilton, MT 59840

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO USE VITAL IMPEACHMENT EVIDENCE WHEN HE DID NOT DISCLOSE AND SECURE THE TESTIMONY OF A WITNESS 1

II. THE DISTRICT COURT ERRED WHEN IT PROHIBITED CROSS-EXAMINATION OF WENDY TALLIS AS TO HER PRIOR CONDUCT INVOLVING DISHONESTY. THE ERROR ALSO VIOLATED MCCLELLAND'S RIGHT TO CONFRONTATION 10

A. The District Court Erred When It Held Rule 608(b) Did Not Apply 10

B. The Error Also Violated McClelland's Confrontation Rights 16

III. THE CUMULATIVE ERROR DEPRIVED MCCLELLAND OF A FAIR TRIAL 19

CONCLUSION 20

CERTIFICATE OF SERVICE 21

CERTIFICATE OF COMPLIANCE 22

TABLE OF AUTHORITIES

CASES

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 16

Hendricks v. Calderon,
70 F.3d 1032 (9th Cir. 1995) 1-2

Illinois v. Jones,
579 N.E.2d 829 (Ill. 1991) 4

State v. Anderson,
1999 MT 60, 293 Mont. 490, 977 P.2d 983 16-17

State v. Boettiger,
2004 MT 313, 324 Mont. 20, 101 P.3d 285 3

State v. Bomar,
2008 MT 91, 342 Mont. 281, 182 P.3d 47 12

State v. Derbyshire,
2009 MT 27, 349 Mont. 114, 201 P.3d 811 10

State v. Gollehon,
262 Mont. 1, 864 P.2d 249 (1993) 14

State v. Jackson,
2009 MT 427, 354 Mont. 63, 221 P.3d 1213 9

State v. Martin,
279 Mont. 185, 926 P.2d 1380 (1996) 12

State v. Taylor,
2010 MT 94, __ Mont. __, __ P.3d __ 18

State v. Van Kirk,
2001 MT 184, 320 Mont. 215, 32 P.3d 735 19

TABLE OF AUTHORITIES (Cont.)

Strickland v. Washington,
466 U.S. 668 (1984) 1

United States ex rel. Partee v. Lane,
926 F.2d 694 (7th Cir. 1991) 5

Washington v. Smith,
786 P.2d 320 (Wash. App. Div. 3 1990) 15

Whelchel v. Washington,
232 F.3d 1197 (9th Cir. 2000) 8, 20

OTHER AUTHORITIES

Montana Code Annotated
§ 46-15-323 3
§ 46-15-329 3

Montana Rules of Evidence
Rule 401 11
Rule 403 11
Rule 608(b) ..... passim
Rule 609 14

Revised Code of Washington
§ 9A.56.060(1) 13

Federal Rules of Evidence
Rule 609 14

Appellant Thomas McClelland (McClelland) respectfully replies to the Appellee's Brief as follows:

I. COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO USE VITAL IMPEACHMENT EVIDENCE WHEN HE DID NOT DISCLOSE AND SECURE THE TESTIMONY OF A WITNESS.

Sue Swenson would have testified that the State's star and only unbiased witness to the assault, Corinne Anderson, told her on the day of the assault that she witnessed Mathias Tallis (Tallis) begin to duck under the fence toward McClelland--in direct contravention to her trial testimony as to the key disputed fact. McClelland's trial counsel knew of Swenson and what she would say, yet he failed to disclose her as a witness and failed to secure her testimony, leaving Anderson's testimony unimpeachable. McClelland's trial counsel rendered ineffective assistance. (Appellant's Br. at 10-20.)

The State does not contest that McClelland's ineffective assistance of counsel claim properly is before this Court. (Appellant's Br. at 20-22.) The State contests only the merits of the claim, which contentions fail.

The State first contests that McClelland's trial counsel's performance was deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Contrary to the State's assertion, McClelland is not making a "hindsight" claim. (Appellee's Br. at 27, 31.) Rather, examining counsel's actions "according to what was known and reasonable at the time the attorney made his choices," *Hendricks v.*

Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995), it is apparent that counsel's performance fell below objective professional standards.

As the district court noted, McClelland's counsel had an investigator who interviewed persons in the Dugout Gulch area and should have known of Corinne Anderson. (D.C. Doc. 50 at 6.) Although the State claims Anderson was not "named as a witness" until March 11, 2009, when the district court granted the State's request to add her as a witness (Appellee's Br. at 28), the State in fact disclosed her as a witness in its March 6, 2009 Motion to File an Amended Information. (D.C. Doc. 28, 36.) Thus, even if counsel did not know of Anderson until the State disclosed her as a witness, as of at least March 6, 2010, counsel knew Anderson would testify for the State. And, as of March 10, 2009, counsel had received transcripts and recordings of the State's interviews of Anderson. (D.C. Doc. 44 at 3.)

Thus, as of March 10, 2009, if not earlier, counsel knew Anderson would serve as the State's sole, unbiased witness to the key disputed fact of the case--whether Tallis started to duck under the fence toward McClelland, prompting McClelland to react in self-defense. Counsel also knew, and had long known, that on the very day of the incident, Anderson told Sue Swenson that she did see Tallis start to duck under the fence before he got hit--in direct contravention to her

anticipated trial testimony. Counsel also knew, however, that Swenson may be reluctant to testify. (3/31/09 Tr. at 9.)

Considering what counsel knew at the time, there simply is no justification for counsel failing immediately to disclose Swenson as a defense witness, and his failure to do so fell below professional standards. The State fails to rebut McClelland's argument that counsel was deficient for failing to timely disclose Swenson as a witness. Nor could it. The requirement for timely disclosure of witnesses was then, and still is, clear, as was the potential exclusion for failure to timely disclose witnesses. Mont. Code Ann. §§ 46-15-323, 46-15-329.

The State posits that counsel was pursuing a strategy of trying to exclude Anderson as a witness. (Appellee's Br. at 31.) Counsel knew there were two possible outcomes to his strategy: either the court excludes Anderson, in which case he would not need to call Swenson; or the court denies the motion, Anderson testifies, and counsel needs to use Swenson. In either case, competent counsel would have disclosed Swenson, should the motion to exclude Anderson be denied. This is especially true because the motion was weak at best because counsel asserted no claim of prejudice from the delay in disclosing Anderson. (D.C. Doc. 44); *State v. Boettiger*, 2004 MT 313, ¶ 16, 324 Mont. 20, 101 P.3d 285 (rejecting challenge to district court's admission of testimony from witness whom State did not disclose because defendant did not establish prejudice). This wasn't strategic:

the only effect of failing to timely disclose Swenson as a witness after counsel learned of the State's intent to have Anderson testify was to foreclose McClelland's ability to call her as a witness.

The State contends counsel was not deficient for failing to secure Swenson's testimony, because counsel pursued a strategy of trying to exclude Anderson's testimony or get Swenson to voluntarily testify, and, once the motion to exclude Anderson was denied on March 27, 2009, all subpoenas had been issued and served and there was no time to conduct a deposition. (Appellee's Br. at 28, 31.) But, that's precisely why counsel should have acted before. It is not strategic to sit back awaiting a weak motion to exclude a witness and simply hope for the best, making no provision for the probable result of denial of the motion. Counsel knew early on that Swenson might not be willing to testify, and received many signals that she was not going to voluntarily appear. (3/30/09 Tr. at 9.) After nearly one month of being unable to reach her and secure her voluntary appearance, a reasonably competent attorney at some point would have tried to secure her testimony through other means.

The State cites cases in which counsel was not deficient for seeking voluntarily appearance of a witness. (Appellee's Br. at 29.) In those cases, however, counsel had an actual basis in fact to believe a witness would voluntarily appear. *E.g.*, *Illinois v. Jones*, 579 N.E.2d 829, 837 (Ill. 1991) (no ineffective

assistance for failing to subpoena any witnesses when all defense witnesses agreed to appear voluntarily); *United States ex rel. Partee v. Lane*, 926 F.2d 694, 702 (7th Cir. 1991) (no ineffective assistance for where witness assured counsel she would appear and counsel sent a ride to get her). Here, in contrast, the witness already told counsel she was reluctant, and he was having no success reaching her. He simply ignored the tools provided by the law to secure witness testimony in such a scenario.

Contrary to the State's contention, McClelland does not suggest that counsel should be required to subpoena all possible witnesses. (Appellee's Br. at 29.) What McClelland asserts is that where counsel knows a witness will be key to impeaching an otherwise credible and unbiased witness on the central disputed fact, knows the witness may be reluctant, and is not able to reach the witness by telephone to seek her voluntary appearance for days and weeks, competent counsel would use the means available to him to secure that witnesses' testimony, whether by deposition or subpoena, or making some effort to reach her beyond phone calls. The State's speculation that counsel risked losing the witnesses' cooperation by subpoenaing her is far-fetched (Appellee's Br. at 29); counsel never had this witness's cooperation--indeed, all signs pointed to a lack of cooperation--and the State's speculation that Swenson would have ignored a subpoena and risk contempt of court is baseless.

Contrary to the State's contention, counsel's actions prejudiced McClelland. The State speculates that Swenson might have ignored the subpoena and risked contempt of court, and that she might not have testified as counsel represented to the court she would. (Appellee's Br. at 31.) This is not a case where a defendant makes unsubstantiated allegations of what a witness may have testified to; defense counsel represented to the court what Swenson would say. (3/30/09 Tr. at 9.) Moreover, the record belies the State's speculation; Swenson appeared at the sentencing hearing and suggested she would have testified as counsel represented, had she been given the opportunity. (7/9/09 Tr. at 16.)

The State next speculates there is no reasonable possibility the outcome would have been different had Swenson testified because, according to the State, the jury would have discounted her testimony based on her association with McClelland. (Appellee's Br. at 32.) The notion the jury would have discounted Swenson's testimony because she was "close" with McClelland is specious. The record at most shows Swenson was a neighbor to McClelland, as well as to Anderson and the Tallises. (7/9/09 Tr. at 14.) The State relies on a hearsay statement from the prosecutor that he received a call from Swenson's husband, and from that leaps to the conclusion that Swenson was close with McClelland and further that the jury would use that relationship to discount her testimony, all the

while ignoring the close relationship between the three Tallis witnesses and crediting their testimony. (Appellee's Br. at 32.)

Contrary to its position at trial, the State now tries to downplay the importance of Anderson's testimony as "only one of four different individuals who testified that Tallis had not threatened McClelland . . . ." (Appellee's Br. at 32.) At trial, however, the State sang a different tune, repeatedly inviting the jury to rely--exclusively--on Anderson's credible testimony (3/31/09 Tr. at 356-57, 359); acknowledging the other three witnesses, the Tallises, all had an interest in the outcome of the case (3/31/09 Tr. at 356-57); emphasizing that Anderson had no dog in the game and no interest in the case and just wanted to tell the truth that Tallis never crossed the fence. (3/31/09 Tr. at 355-56.) The State asserted the jury could rely solely on Anderson's testimony; indeed that she "put[] the crowning blow" on McClelland's self-defense claim. (3/31/09 Tr. at 355, 359.)

Moreover, the State's broad and unfounded claim that Swenson's testimony would not have affected the jury's view of the other witnesses' credibility fails. (Appellee's Br. at 33.) At trial, the prosecutor used Anderson's unassailable credibility to bolster the Tallises, recognizing their credibility was questionable because of their interest but emphasizing that Anderson was "very consistent" with what the Tallises said. (3/31/09 Tr. at 356-57.) Thus, McClelland lost the opportunity to not only impeach the credibility of the State's star witness in

Anderson but the remaining eyewitnesses. *See Whelchel v. Washington*, 232 F.3d 1197, 1208 (9th Cir. 2000) (recognizing the bolstering effect of consistent testimony among witnesses). In a credibility contest like this one, the inability to impeach the State's witnesses was devastating.

Finally, the State inappropriately gives its own assessment of McClelland's credibility, asserting it was so "inherently incredible" that Swenson's testimony would not have affected the outcome of the trial. (Appellee's Br. at 33-34.) The State's claim that McClelland's testimony was rife with inconsistencies mischaracterizes his testimony. McClelland was seventy-two at the time of the incident and in poor health. (7/9/07 Tr. at 33-34.) He was not, and still is not, sure of what exactly happened that day. (3/31/09 Tr. at 303, 338.) He explained that inconsistencies in his statements were caused by the deputy yelling in his face and his elevated blood pressure. (3/31/09 Tr. at 320.) He admitted taking down the sign, as well as hitting Tallis, although he did not know whether his cane caused the laceration directly, or whether Tallis hit his head on the fence post as a result of McClelland hitting him. (3/31/09 Tr. at 303, 325, 337-38.) Nor is there any inconsistency between his statements that Tallis started rushing at him ("waylaid" him) and that his four-wheeler also got stuck on the berms. (3/31/09 Tr. at 296-97, 319-20, 335.)

In any event, any apparent inconsistencies go to credibility, and it is for the jury--not counsel on appeal--to make credibility determinations. State's counsel was not present at the trial and did not view the witnesses' demeanor, hear the witnesses' voice inflections, or observe the witnesses' body language; her opinion, based on the cold transcript, that McClelland was "inherently incredible" and the State witnesses credible, is irrelevant. The fact-finder is the sole judge of credibility, and the Court does not engage in its own determination of which witnesses are "inherently" credible or not. *State v. Jackson*, 2009 MT 427, ¶ 23, 354 Mont. 63, 221 P.3d 1213 (Court does not substitute its judgment for the jury, whose exclusive province is credibility.). Because of counsel's ineffective assistance, the jury was deprived of information going directly to the credibility of the State's otherwise unimpeachable key witness, on the key disputed fact, in a credibility contest. Just as the Court will not substitute its judgment for the jury's, so should the Court not assume that the highly relevant information would have had no impact on the jury's assessment of credibility.

McClelland received ineffective assistance of counsel which deprived him of a fair trial.

II. THE DISTRICT COURT ERRED WHEN IT PROHIBITED CROSS-EXAMINATION OF WENDY TALLIS AS TO HER PRIOR CONDUCT INVOLVING DISHONESTY. THE ERROR ALSO VIOLATED MCCLELLAND'S RIGHT TO CONFRONTATION.

McClelland contends the district court erred when it prohibited him from cross-examining Wendy Tallis on the conduct underlying her conviction for unlawful issuance of bad checks--an offense that requires intent to defraud--as it relates to her character for untruthfulness, and the error was not harmless. The State's contentions to the contrary are unavailing.

A. The District Court Erred When It Held Rule 608(b) Did Not Apply.

This Court has held that when an evidentiary ruling is based on an interpretation of a Rule of Evidence, this Court's review is *de novo*. *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. Nevertheless, the State contends that *all* aspects of a district court's determination under Rule 608(b) are discretionary and subject to abuse of discretion review. (Appellee's Br. at 10-11.) The State quotes selectively from the Commission Comments in support of its contention. The full text of the paragraph from which the State quotes reads:

> There have been no Montana cases holding that a specific instance of conduct was improperly inquired into where the conduct was probative of truthfulness or untruthfulness. This is the *standard* imposed by the subdivision. The subdivision *also* contains the *additional* safeguard that the discretion of the court will determine whether a specific instance will be used at all. The court must consider the admissibility of this type of evidence, like any other impeaching evidence, under Rules 401 and 403. Also see

> Commission Comments to Rules 405(b) and 607. The Commission intends to change Montana law only to the extent that specific instances of conduct probative of truthfulness or untruthfulness and weighed by the trial court will be admissible. The Montana cases excluding specific instances of conduct would probably have the same result under this rule because they did not relate to these character traits.

Commission Comments, Mont. R. Evid. 608(b) (emphases added).

Thus, as Mont. R. Evid. 608(b) and the Commission Comments recognize, where a party seeks to cross-examine a witness on specific conduct for the purpose of attacking the witness's credibility, a district court must engage in a two-part analysis. First, it must interpret and apply the "standard" of whether conduct is probative of truthfulness or untruthfulness. Second, even if the conduct is probative of truthfulness or untruthfulness, the court determines whether the conduct can be used in this particular case, weighing factors under Mont. R. Evid. 401 (relevance) and 403 (probative value substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence).

Here, the district court's analysis began and ended at step one. The court determined, as a matter of law, that the unlawful issuance of bank checks is not "an indicator of dishonesty" and therefore that Rule 608(b) was "inapplicable." (D.C.

Doc. 50 at 3, attached to Appellant's Br. as Ex. 1.) The relevant portion of the court's discussion is:

> In *State v. Martin*, the Montana Supreme Court affirmed a district court's ruling that prohibited the State from introducing evidence that a defense witness had been convicted of the crime of unsworn falsification to authorities but allowed the State to cross-examine the witness regarding whether she had previously supplied false alibi information, pursuant to Rule 608(b). *Martin*, 279 Mont. at 199, 926 P.2d at 1389. The *Martin* court noted that criminal acts that indicate dishonesty, such as forgery, bribery, suppression of evidence, false pretenses, and embezzlement, are admissible pursuant to Rule 608(b). *Id.*, 279 Mont. at 200, 929 P.2d at 1390. The court observed that it had declined to broaden the list of indicators of dishonesty to include the crimes of theft and burglary, which presumably are not indicators of dishonesty. *Id.*, 279 Mont. at 200, 926 P.2d at 1389, citing *State v. Gollehon*, 262 Mont. 1, 864 P.2d 249 (1993).
>
> Defendant has not shown how the improper issuance of bank checks is an indicator of dishonesty. Accordingly, Rule 608(b) is inapplicable here, and the State's motion should be granted.

(D.C. Doc. 50 at 3.)

Thus, the district court determined that the unlawful issuance of bank checks is not among the list of offenses whose conduct indicate dishonesty and thus that Rule 608(b) did not apply--nor would it ever apply, under the court's interpretation of the Rule. This was an erroneous interpretation and application of Rule 608(b) and this Court's decision in *State v. Martin*, 279 Mont. 185, 926 P.2d 1380 (1996). The ruling was based on a conclusion of law, and this Court's review is plenary. *State v. Bomar*, 2008 MT 91, ¶ 14, 342 Mont. 281, 182 P.3d 47.

The district court did not, as the State suggests, make a discretionary determination that Wendy Tallis's conduct was not "sufficiently" probative of untruthfulness. (Appellee's Br. at 11.) Those are the *State's* words, not the district court's. The court said nothing about whether the particular conduct at issue was "sufficiently" or insufficiently probative. It simply determined, erroneously, that unlawful issuance of bank checks does not fall under the exception in Rule 608(b). The district court did not go on to hold that, even if Rule 608(b) were applicable, it would exercise its discretion to exclude the evidence because it was too remote or prejudicial or might confuse the jury.

Nevertheless, even under the more deferential abuse of discretion standard advocated by the State, the district court committed reversible error in prohibiting McClelland from cross-examining Wendy Tallis on the conduct underlying her Washington conviction for unlawful issuance of bank checks. As discussed further in Appellant's Br. at 24-26, by its terms a conviction for unlawful issuance of bank checks includes--as an element of the offense--the intent to defraud. Rev. Code Wash. (ARCW) § 9A.56.060(1) ("Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he or she has not sufficient funds in, or credit with the bank or depository . . . is guilty of unlawful issuance of a bank check . . .). Thus,

the State is wrong that the facts of this case are similar to *Gollehon*. (Appellee's Br. at 14.) There, the conduct at issue involved theft and burglary, not an act expressly requiring intent to defraud. *State v. Gollehon*, 262 Mont. 1, 21-25, 864 P.2d 249, 257-59 (1993).

Neither the district court, nor the State, offered any reasoning as to why conduct that necessarily involves the intent to defraud does not indicate dishonesty and is not probative of untruthfulness. This Court has not previously addressed whether conduct underlying the unlawful issuance of bank checks involves dishonesty. Thus, as persuasive authority McClelland cited numerous cases from other jurisdictions (including Washington) that have all held, for purposes of Fed. R. Evid. 609 or state analogs, that issuance of a bad check with intent to defraud, or knowledge it will be dishonored, involves dishonesty. (Appellant's Br. at 25.)

The State contends those cases are not persuasive authority because they deal with Fed. R. Evid. 609 or state analogs, which allow evidence of a conviction involving dishonesty, while Montana's Rule 609 does not. (Appellee's Br. at 12-13.) Those cases, however, stand for the proposition that unlawful issuance of a bad check with intent to defraud involves dishonesty--the relevant issue here. Whereas those jurisdictions would allow extrinsic evidence of a conviction of a crime involving dishonesty, Montana would allow only the underlying conduct to be inquired into on cross-examination as to a witness's character for truthfulness.

In either case, however, the court initially must determine whether the conviction involves dishonesty. The State points to no flaw in the actual reasoning underlying those courts' determinations that unlawful issuance of a bad check with intent to defraud involves dishonesty.

The State also asserts that *Washington v. Smith*, 786 P.2d 320 (Wash. App. Div. 3 1990), is not persuasive because it relies on a previous Washington state case holding that theft crimes involve dishonesty, whereas Montana has rejected that position. (Appellee's Br. at 13.) The State fails to note, however, that the Washington court, as a separate basis for its decision, held that unlawful issuance of a bank check contains as a element the intent to defraud, which intent involves dishonesty. *Smith*, 786 P.2d at 322.

Further, the State's assertion that McClelland "proposed to ask thinly-veiled questions about a prior *conviction*" is baseless. (Appellee's Br. at 14 (emphasis in original).) In response to the State's motion *in limine* to exclude the conviction, McClelland stated that he wished to raise the *conduct* itself. (D.C. Doc. 48 at 1.) This was a pretrial motion; he hadn't asked any "thinly-veiled questions" nor had he proposed any. The record reflects only that he wished to cross-examine Wendy Tallis on her character for truthfulness--in a case that turned on the credibility of eyewitnesses--using the conduct relating to her issuance of bank checks with intent to defraud.

The State speculates as to possible reasons underlying the district court's supposed exercise of its discretion, but none of those reasons were actually stated or relied upon by the district court. (Appellee's Br. at 15-16.) The district court erred when it misinterpreted and misapplied Rule 608(b) and held that conduct involving the intent to defraud does not indicate dishonesty. Moreover, the error was not harmless. (Appellant's Br. at 27-29, 32-24.)

B. The Error Also Violated McClelland's Confrontation Rights.

The State contends the district court's prohibition on cross-examination of Wendy Tallis about her prior dishonest conduct did not violate McClelland's Confrontation Clause right to effective cross-examination, because the court's decision imposed a reasonable limit on cross-examination. (Appellee's Br. at 19.) McClelland agrees that a district court has "wide latitude" to impose reasonable limits on cross-examination based on concerns about prejudice, confusion of the issues, relevance, etc. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). That, however, is not what the district court did here.

The State propounds various reasons the district court could have limited cross-examination, speculating that Wendy Tallis's conduct was not "sufficiently" probative or cross-examination on it could have caused her "severe embarrassment." (Appellee's Br. at 20-21.) The State did not raise these arguments below. *See State v. Anderson*, 1999 MT 60, ¶ 25, 293 Mont. 490, 977

P.2d 983 ("A party may not change its theory on appeal from that advanced in the trial court; nor may a party raise an argument for the first time on appeal."). More importantly, the district court did not exercise its discretion in the manner the State now claims on appeal. As discussed above, the district court's decision was based entirely on its interpretation of Rule 608(b) and its erroneous application of the Rule to exclude conduct involving the intent to defraud. It made no further determination that in its discretion it would exclude cross-examination because of the concerns the State now raises on appeal. Its erroneous interpretation and application of Rule 608(b) improperly limited McClelland's ability to cross-examine a witness against him in violation of his Confrontation Clause rights. (Appellant's Br. at 29-34.)

The State argues the Court should not exercise plain error review of the Confrontation Clause violation by downplaying the import of Wendy Tallis's testimony and McClelland's inability to attack her credibility. (Appellee's Br. at 18.) The physical evidence in the case did not establish the elements of the offense or McClelland's theory of self-defense--only the eyewitness testimony did. Indeed, the case turned on credibility, specifically whether or not Tallis advanced toward McClelland. The State speculates that the jury considered and rejected Wendy Tallis's potential for bias based on her family relationship with the alleged victim, and further speculates that the jury also would have discounted Wendy

Tallis's prior dishonest conduct. However, credibility determinations are for the jury to make; the Court cannot simply speculate as to what the jury would consider important or not. McClelland was not allowed to impugn a key State witness's credibility, whose testimony bolstered that of other witnesses. In a trial based on a credibility contest, that inability leaves unsettled the question of the fundamental fairness of the trial, making plain error review appropriate. *State v. Taylor*, 2010 MT 94, ¶ 17, __ Mont. __, __ P.3d __.

Finally, the State claims trial counsel was not ineffective because counsel cannot be ineffective for failing to raise an unsettled or debatable theory of law, nor one based on law from other jurisdictions. (Appellee's Br. at 34-35.) There was nothing "unsettled"--the law was clear that conduct involving dishonesty can be used on cross-examination. Nor did the theory rest on law from other jurisdictions. Although Montana has not squarely addressed conduct involving passing bad checks with intent to defraud, the "theory" that one can use conduct involving dishonesty was well-settled in Montana. Mont. R. Evid. 608(b).

III. THE CUMULATIVE ERROR DEPRIVED MCCLELLAND OF A FAIR TRIAL.

Contrary to the State's contention (Appellee's Br. at 37-40), the doctrine of cumulative error applies; the cumulative effect of the errors that prevented McClelland from impeaching Anderson and Wendy Tallis deprived him of a fair trial. The State again offers its personal assessment of witness credibility, specifically "there is no question" that Mathias Tallis's testimony was more credible. (Appellee's Br. at 38.) State counsel did not see Tallis's demeanor and counsel's assessment based on a cold transcript is irrelevant. McClelland admitted he assaulted Tallis and destroyed his property. The central disputed fact was whether Tallis started under the fence toward McClelland or not. The physical "evidence" the State cites (Tallis's injury, the blurry photograph showing Tallis charging at McClelland and purportedly showing the downed sign) proves nothing with regard to that fact. (Appellee's Br. at 38, 40.) That is not the type of qualitatively better evidence this Court considers. *State v. Van Kirk*, 2001 MT 184, ¶ 47, 320 Mont. 215, 32 P.3d 735.

This was a credibility contest that rested on the testimony of eyewitnesses to whether Tallis started under the fence, prompting McClelland's act of self-defense. McClelland was unable to impeach the credibility of two of the eyewitnesses, because of the district court's error in excluding cross-examination of Wendy Tallis on prior dishonest conduct and counsel's ineffective assistance resulting in

an inability to use Swenson's testimony to impeach Anderson with a prior inconsistent statement on the key disputed fact. Each witness bolstered the other, thus making each more credible. *Whelchel*, 232 F.3d at 1208. The State emphasized Anderson's credibility, invited the jury to rely on it, and used it to bolster the Tallis's testimony. (Appellee's Br. at 39-41.) Contrary to the State's contention, the cumulative effect of these errors was not harmless beyond a reasonable doubt.

CONCLUSION

McClelland respectfully requests the Court vacate his conviction and remand for a new trial.

Respectfully submitted this ___ day of June, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

`

By: _____
JENNIFER A. HURLEY
Assistant Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply brief of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

GEORGE H. CORN
Ravalli County Attorney
Courthouse
205 Bedford Street
Hamilton, MT 59840

THOMAS McCLELLAND
P.O. Box 65
Darby, MT 59829

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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JENNIFER A. HURLEY